Supreme Court, U.S.
FILED
OCT 11 2001
OFFICE OF THE CLERK

No. 01-430

In The

Supreme Court of the United States

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Respondent, Herbert Gulliford, opposes the petition of Deputy Paul Thrash for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

REPORTS OF OPINIONS

The decision of the Ninth Circuit Court of Appeals which is the subject of Deputy Thrash's petition for writ of certiorari is an unpublished memorandum, *Gulliford v. Thrash*, 2001 WL 427285 (9th Cir. Apr. 25, 2001).[1] (Pet. App. C.)

This matter was previously before both the Ninth Circuit and this Court. The decision in that appeal was *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998), *cert. denied*, 525 U.S. 828 (1998). (Pet. App. A.) The Petitioner neglected to include a copy of this Court's order denying certiorari in that decision. A copy of the order is included in the Respondent's Appendix in this volume.

[1] The case title of *Gulliford v. Pierce County* was changed to *Gulliford v. Thrash* during its second trip to the Ninth Circuit Court of Appeals. For clarity, the 1998 opinion entitled *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998), *cert. denied*, 525 U.S. 828 (1998), will be referred to as *Gulliford I*. The 2001 memorandum entitled *Gulliford v. Thrash*, 2001 WL 427285 (9th Cir. Apr. 25, 2001), will be referred to as *Gulliford II*.

STATUTES INVOLVED

It should be noted that the text of the Revised Code of Washington § 9A.76.020 (hereinafter RCW 9A.76.020), as provided to this Court by the Petitioner, is incorrect. (Pet. App. "W" 2-3.) Petitioner cites the 1995 version of the statute which is substantially different from the 1975 version in place at the time of this incident in 1992:

> "**9A.76.020 Obstructing a public servant.** Every person who, (1) without lawful excuse shall refuse or knowingly fail to make or furnish any statement, report, or information lawfully required by him by a public servant, or (2) in any such statement or report shall make any knowingly untrue statement to a public servant, or (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor. (1975 1st ex.s. c 260 § 9A.76.020)"[2]

STATEMENT OF THE CASE

I. FACTS

Petitioner Thrash has attempted to gloss over the facts of this case, and attempted to rewrite the facts by so doing. Thrash cites *United States v. Poocha*, 2001 WL

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[2] Sections 1 and 2 of the statute had been found to be unconstitutional by the Washington State Supreme Court in *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982), ten years before Mr. Gulliford was arrested. Mr. Gulliford was arrested for violation of Section 3 of the 1975 version of the statute.

880840, at *3 (9th Cir. Aug. 7, 2001) to bolster his recitation of the facts, although none of the judges who heard *Poocha* heard either *Gulliford I* or *Gulliford II*. A more accurate rendition of the facts is found in *Gulliford I*, 136 F.3d 1345, 1347 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998).

Because Petitioner's Questions 2 and 3, as posed to this Court, are based upon his misrepresentations of these facts, it is necessary to review what actually happened on Herron Island.

Deputy Thrash completely neglects to mention that the entire episode was recorded on videotape with sound recording.[3] (Ex. 10.) In reaching its decision, the Court of Appeals had access to Exhibit 10, and viewed it before hearing oral arguments in this appeal and in *Gulliford I*.

Petitioner continues to insist that Mr. Gulliford "failed to disperse". (Pet. 2-3, 5-6, 14, 20-24.)

Ex. 10 shows that the first order to disperse was issued after Mr. Gulliford was already on the ground, pulled down from behind by Deputy Thrash. Deputy Terrill Larson yelled, "Disperse, disperse, that's *once*, you've been warned." Mr. Gulliford was already under arrest at that time, face down in the beach sand with Deputy Thrash on top of him, kneeing him in the neck. (Ex. 10.)

Thrash further neglects to mention that Mr. Gulliford had no part in the events earlier on the day in question.

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[3] The videographer, Curt Bray, an island teenager and Eagle Scout, was also arrested for Obstructing A Public Servant that night, but was also never charged with a crime. (Exs. 10 and 12.)

There are no allegations in any of the evidence that Mr. Gulliford did anything other than to arrive at the community beach shortly before the deputies did.

The deputies were looking for a man named J.D. After arresting (and apparently un-arresting) a Mr. Petersen – the wrong person – Deputy Thrash angrily addressed the crowd, cursing at them and telling a woman who spoke to "Shut up, just shut up!" (Ex. 10.)

As Deputy Thrash lectured this group of mostly middle-aged people, and in response to Thrash's statement, "This is a waste of government . . . ," Gulliford responded in a conversational tone, "Then why don't you hop on the ferry, hop on the ferry and go back." (Ex. 10. *See also Gulliford I*, 136 F.3d 1345, 1347 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998).)

In the words of Deputy Patrick Donnelly, "U 147 [Thrash] walked around the fire and grabbed Mr. Gulliford from behind and pulled him over backwards." (Ex. 13.)

Each of the deputies agree that Mr. Gulliford never moved, opened his mouth to express his opinion in a single sentence, and was immediately arrested. (Exs. 10, 12, 13 and 14.)

An accurate summary of the pertinent parts of the police reports can be found in *Gulliford I*, 136 F.3d 1345, 1350 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998), at n. 7.

Ex. 10 shows a group of approximately fifteen people, some as old as 70, none of whom was armed, none of whom made a physical move toward the deputies, and none of whom was threatening the officers.

In actual fact, the most threatening behavior presented that night occurred when the officers were physically beating Mr. Gulliford, and this crowd of mostly middle-aged people shouted promises to call their respective lawyers in the morning. (Ex. 10.) Perhaps a frightening thought, but certainly not a crime.

J.D. was never arrested (that night or at a later date), neither Mr. Gulliford nor videographer Bray was ever charged with a crime, much less convicted of one, and even the beachfire which seemed to be of such concern was allowed to burn itself out the next day.

II. PROCEDURAL HISTORY

Plaintiff Gulliford originally brought an action in Pierce County (Washington) Superior Court. Following a voluntary non-suit, this action was filed in the United States District Court for the Western District of Washington at Tacoma. (CR 1.)

A jury trial was held, with the jury instructed that if Gulliford's words so much as *delayed* the officers, he was guilty of obstruction and there was probable cause for his arrest. (CR 146, Instruction 15, paragraph 5.)[4] The jury found for Defendant Thrash. (CR 148.) An appeal was taken to the Ninth Circuit Court of Appeals. (CR 158.)

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[4] The remaining paragraphs of this lengthy jury instruction were correct statements of the law and were expressly not appealed.

The verdict was overturned based upon the incorrect statement of law in the jury instruction. One judge dissented, although he agreed that the instruction at issue was incorrect. His dissent was based upon his belief that Gulliford had not adequately preserved his objection to the relevant instruction.

The dissenting judge did not reach the issue of qualified immunity. The majority ruled that Deputy Thrash had not adequately preserved his objection to the district court Judge's denial of his request for qualified immunity, although they stated that even if the proper procedures had been followed, it did not appear that the district court erred in denying qualified immunity to the officer. (Pet. App. A.)

Thrash's requests for rehearing and rehearing en banc were denied, and *not a single judge* of the circuit requested that a vote be taken as to whether to rehear the case en banc. (Pet. App. B.)

The case returned to the district court for a second trial presided over by a different judge. This judge used a slightly different jury instruction, but the instruction still did not reflect that Gulliford's words were not "fighting words" as a matter of law, as the Ninth Circuit had ruled. (CR 301, Instruction 16.) The judge also allowed instructions regarding "other crimes" Gulliford was now alleged to have committed. (CR 301, Instruction 10.) (After having listened to three weeks of testimony, the judge in the first trial had already ruled that the jury was not allowed to consider these so-called "other crimes".) The second jury also found for Deputy Thrash. (CR 302.)

Plaintiff Gulliford again appealed based upon the incorrect jury instruction, the reintroduction of allegations of "other crimes", and the judge's failure to direct a verdict on liability. (CR 307.)

In an unpublished memorandum,[5] two of the three judges ruled that the jury instruction was again a misstatement of the law, that the law of the case doctrine should have prevented the reintroduction of allegations of "other crimes" supposedly committed by Gulliford, and ruled that the district court judge should have directed a verdict on liability as no properly instructed jury could have found that Gulliford's words were a crime, and that the defendants could present no other viable basis to support a finding of probable cause to arrest the plaintiff. (Pet. App. C.)

The third judge agreed that the jury instruction was a misstatement of the law, but believed that the jury should have been able to consider "other crimes" which the defendant now alleged Gulliford had committed.

However, the dissenting judge waived his right to have the opinion published,[6] and while voting for rehearing by the original panel, he voted to reject Thrash's petition for rehearing en banc. *Not a single judge* of the circuit asked that a vote be taken as to whether to rehear the case en banc. (Pet. App. D.)

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[5] Petitioner Thrash did not make a request pursuant to Ninth Circuit Rule 36-4 to have this memorandum published.

[6] See Ninth Circuit Rule 36-2(g).

REASONS FOR DENYING WRIT

I.

THE CORRECT PROCEDURE FOR SEEKING REVIEW OF A DENIAL OF QUALIFIED IMMUNITY WAS NOT AT ISSUE IN THIS DECISION

A. Qualified Immunity Is Not Even Mentioned In This Unpublished Memorandum

In raising the issue of the correct procedure for claiming qualified immunity on appeal, it appears that Petitioner Thrash is referring to the published opinion in *Gulliford I*, not to the unpublished memorandum from *Gulliford II*. Qualified immunity was not an issue in the second trial of this matter, the phrase "qualified immunity" was never mentioned in Thrash's brief to the Ninth Circuit in *Gulliford II*, and it is not mentioned at all in the decision of the Ninth Circuit in *Gulliford II*.[7]

By again raising qualified immunity in his first and second questions posed to this Court, Petitioner has, in effect, asked this Court for a rehearing of its denial of his petition for writ of certiorari in *Gulliford I . . . more than one thousand days after this Court denied his petition*.[8]

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[7] The Petitioner originally asked the district court for a decision granting him qualified immunity on October 19, 1995 (CR 27.) This was denied by the district court on December 15, 1995. (CR 77.) The Ninth Circuit rejected Thrash's claim of qualified immunity in its opinion in *Gulliford I* on February 27, 1998. (Pet. App. A.) This court denied his petition for writ of certiorari on October 5, 1998. (Respondent's Appendix in this volume.)

[8] S.Ct. *Rule* 44.2 states, in pertinent part: "Any petition for the rehearing of an order denying a petition for writ of

B. This Court Acted Correctly When It Denied Certiorari In *Gulliford I* In 1998

Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. ___ (2001).

The first step in the analysis of qualified immunity claims is to determine whether the facts, as alleged by the non-moving party, would show that a constitutional right was violated. Gulliford alleged that he was arrested for nothing more than uttering one sentence of verbal criticism to the police, which violated his First Amendment right to free speech.

The second step in the analysis is to determine whether the constitutional right which has been identified is "clearly established". The right to verbally criticize

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certiorari . . . shall be filed within 25 days after the date of the order of denial . . . , but its grounds shall be limited to intervening circumstances of a substantial or controlling grounds not previously presented. The petition shall be presented together with certification of counsel . . . that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay[.]"

our public officials without thereby risking arrest has been clearly established since *at least* 1949. See *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 896-97, 93 L.Ed. 1131 (1949); *Lewis v. City of New Orleans*, 415 U.S. 130, 132-134, 94 S.Ct. 970, 971-973, 39 L.Ed.2d 214 (1974); *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-463, 107 S.Ct. 2502, 2509-11, 96 L.Ed.2d 398 (1987); *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1994); *Mackinney v. Nielsen*, 69 F.3d 1002, 1006-07 (9th Cir. 1995).

Petitioner raises the procedural issue of when and how differing circuits require defendants to appeal from a denial of qualified immunity. He cites *Powell v. Schriver I*, 175 F.3d 107 (2nd Cir. 1999). In *Powell I*, the Second Circuit did not require an official to appeal from the denial of qualified immunity by the district court.

Powell I, which apparently has not been reviewed by this Court, was decided six months after certiorari was denied in *Gulliford I*.

In the procedures used by the Ninth Circuit, defendants who have been denied qualified immunity by the district court should immediately appeal the decision in order to prevent a trial from going forward. If the defendant waits until the completion of a trial of the matter, he should cross-appeal the district court's denial of qualified immunity if he expects to expand his rights on appeal and prohibit a second trial from taking place in the event the verdict would otherwise be reversed on separate grounds. *Gulliford I*, 136 F.3d 1345, 1351 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998).

The Second Circuit procedures allow the defendant who has been denied qualified immunity by the district

court to use qualified immunity as a defense to liability on review without filing a cross-appeal. This not only flies in the face of the decision in *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (qualified immunity is an immunity from suit rather than a mere defense to liability), but it encourages parties to go through the costs and expenses of needless trials. If an officer truly could not have known that his behavior would violate a right, an action should not proceed to trial.

Yet even if this Court prefers the procedural requirements of the Second Circuit over those of the Ninth Circuit, the issue would be moot for two reasons. First, this Court has already reviewed the decision in *Gulliford I* and denied certiorari, and secondly, the right allegedly violated in this case was so clearly established decades before Gulliford was arrested for his speech that the procedural requirements of any circuit would be irrelevant to the final decision on qualified immunity.

II.

THE FEDERAL AND STATE COURT PRECEDENTS IN THIS MATTER ARE IDENTICAL

A. The Decision In *Gulliford I* Was Reviewed Three Years Ago

As discussed in Section I.A. of this brief in opposition, qualified immunity is not properly before this Court.

Furthermore, Petitioner's Question 2 in this petition is virtually identical to his Question 2 in *Gulliford I*, as to which this Court denied certiorari three years ago.

- Text of Question 2 in *Gulliford II* (2001):

  "In determining when First Amendment rights are 'clearly established' for qualified immunity purposes, should federal courts give full faith and credit to precedent of the officer's home state that upholds similar arrests against similar constitutional challenges?"

- Text of Question 2 in *Gulliford I* (1998):

  "Where a Circuit Court interprets certain police conduct as unconstitutional but a state court upholds it under the same federal provision, do police of that state violate 'clearly established' rights and lose their qualified immunity by relying on their state court's precedent?"

S.Ct. Rule 14.1(a) states, in pertinent part, that "The statement of any question presented is deemed to comprise every subsidiary question included therein." Petitioner has asked this Court to consider the same question twice, three years apart, and it pertains to an issue not even raised in the decision currently being reviewed.

B. Qualified Immunity Does Not Protect Officers From Behavior Which Is Clearly Established To Be Unconstitutional

Assuming *arguendo* that the Petitioner's procedural problems are overlooked by this Court, Petitioner poses an interesting question: whether Circuit Courts of

Appeals must give full faith and credit to decisions of state courts when those decisions interpret the same federal provision differently from the federal courts.

However, this question has no relation at all to the decision in *Gulliford I*.[9] The state court precedent, *State v. Lalonde*, 35 Wn.App. 54, 665 P.2d 421 (1983), is identical to the federal precedents, including *Mackinney v. Nielsen*, 69 F.3d 1002, 1006-07 (9th Cir. 1995); *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1994); *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-463, 107 S.Ct. 2502, 2509-11, 96 L.Ed.2d 398 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 132-134, 94 S.Ct. 970, 971-973, 39 L.Ed.2d 214 (1974); *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 896-97, 93 L.Ed. 1131 (1949); and so many others.

Contrary to Petitioner's representation, in *Lalonde* the officers had already been physically attacked twice by other party-goers. Lalonde persisted in physically approaching the officers, was repeatedly told to get back, was physically *pushed* back, and when he physically approached yet again, was arrested.

In upholding a guilty verdict against Mr. Lalonde for Obstructing a Public Servant, the Washington State Court of Appeals wrote in *State v. Lalonde*, 35 Wn.App. 54, 61, 665 P.2d 421 (1983): "Lalonde's offense did not arise from his speech, but from the acts which accompanied his words."

Even while refusing to examine the issue of qualified immunity because of Appellee's failure to cross-appeal,

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[9] The issue is not even mentioned in *Gulliford II*.

the Court of Appeals in *Gulliford I* noted that the right to verbally question the actions of police was "sufficiently clear" so that a reasonable officer could understand that he or she was violating the right. *Gulliford I*, 136 F.3d 1345, 1351 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998).

Pre-existing Washington State and federal law, dating back many decades, all concur that such speech is not a crime, and "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston, Texas v. Hill*, 482 U.S. 451, 462, 107 S.Ct. 2502, 2510, 96 L.Ed.2d 398 (1987).

State v. Lalonde, 35 Wn.App. 54, 665 P.2d 421 (1983), which reinforced that speech alone was not a crime and was not criminalized by RCW 9A.76.020, was decided *nine years* before Mr. Gulliford was arrested.

The Ninth Circuit Court of Appeals ruling in *Gulliford I* directly complies with, and reinforces, the Washington State Court of Appeals' decision in *State v. Lalonde*, that only acts may be criminalized, not speech alone.

Petitioner cites dicta from a footnote to *City of Houston, Texas v. Hill*, 482 U.S. 451, 462, 107 S.Ct. 2502, 2510, 96 L.Ed.2d 398 (1987) to support his case. (Pet. 13.) Yet even this footnote dicta supports Mr. Gulliford's position. He did not run alongside an officer chasing a fleeing felon, or persistently try to engage an officer in conversation who was attempting to direct traffic at a busy intersection. Mr. Gulliford never moved, verbally expressed his opinion in a single sentence, and was immediately arrested.

Deputy Thrash cites several cases, including *U.S. v. Brice*, 926 F.2d 925 (9th Cir. 1991), which have facts too dissimilar to the events in Gulliford to be useful.

The Petitioner claims that the Ninth Circuit failed to look at the context of the events in determining whether the right which was violated was "clearly established". He cites *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987), and *Saucier v. Katz*, 533 U.S. ___ (2001). (Pet. 11-12.)

Although *Saucier v. Katz* is a Fourth Amendment ca rather than a First Amendment case, the principal that actions must be looked at in the context of events remains true. (*See also Anderson v. Creighton*, 483 U.S. 635, 640-41, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).) In the case at bar, this is exactly what occurred. The Ninth Circuit, in *Gulliford I*, 136 F.3d 1345, 1350 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998), stated that "[t]he facts before us are indistinguishable from those in *Hill* and its progeny.", citing *City of Houston, Texas v. Hill*, 482 U.S. 451, 465-67, 107 S.Ct. 2502, 2511-13, 96 L.Ed.2d 398 (1987). The court stated that even if Thrash had correctly appealed the denial of qualified immunity by the district court, "it does not appear that the district court erred in denying the officials qualified immunity." *Gulliford I*, 136 F.3d 1345, 1351 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998). The court went on to quote *Mackinney v. Nielsen*, 69 F.3d 1002, 1007 (1995):

> "Police officers have a difficult job, and they deserve the respect of their community. But they in turn must respect the right of individuals in that community to question their government and the role of the police. A reasonable officer

should have known that Mackinney was simply exercising that right."

Petitioner again attempts to convince this Court to decide a question which is not related to the facts or the law of this case, and which is not even raised in *Gulliford II* – the decision currently being reviewed. Mr. Gulliford did nothing but speak, and all of the precedents, state and federal, are completely consistent on this issue – speech alone, even when it is critical of police or their actions, is not a crime.

III.

WHEN PLAINTIFF DID NOTHING BUT SPEAK AND HIS SPEECH WAS PROTECTED BY THE FIRST AMENDMENT, THE NINTH CIRCUIT WAS CORRECT IN DIRECTING A VERDICT OF LIABILITY

A. The Petitioner Is Rearguing Facts Which Were Already Reviewed By This Court

Petitioner's Question 3 in this petition misstates the same facts as his Question 1 in *Gulliford I*, as to which this Court denied certiorari three years ago.

- Text of Question 3 in *Gulliford II* (2001):

  "May the Ninth Circuit, under the guise of the 'law of the case' and by preempting a jury's fact finding role, direct liability against a police officer because the arrestee accompanied his unlawful act with First Amendment speech?"

- Text of Question 1 in *Gulliford I* (1998):

  "Where a suspect verbally opposes police while at the same time he physically commits

> a crime, does the First Amendment overcome the Fourth Amendment to shield him from arrest?"

Petitioner Thrash continues to insist that Gulliford committed physical acts in addition to lawfully verbalizing his opinion. Yet the panel in *Gulliford I*, 136 F.3d 1345, 1350 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998), stated that "that is all that Gulliford did – he spoke." The district court judge in *Gulliford I*, after hearing three weeks of testimony, precluded the jury from considering "other crimes" that the defendant was alleging Gulliford had committed. The videotape (Ex. 10) clearly shows that the first *lawful* order to disperse was issued after Gulliford was already under arrest.[10]

The Petitioner continues to misstate the facts of this case in order to manufacture a question which may be of interest to this Court. Even the state statute at issue in this matter was incorrectly quoted to this Court.

B. The Defendant Presented No Viable Basis For Probable Cause To Arrest Gulliford

At page 20 of his petition, Thrash states that "this decision . . . essentially holds probable cause to arrest for

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[10] Although not precedent in this case, in the prior state court proceeding in this matter, Pierce County (Washington) Superior Court Judge Karen Strombom denied Thrash's Motion for Partial Summary Judgment, stating, "I don't see that saying, 'This party is over,' is an order to disperse, and it seems to me you can't have people guess what an officer is telling them and then find probable cause for arrest if you're saying, 'The party is over.' "

obstructing an officer does not exist if accompanied by *First Amendment speech*[.]" To the contrary – the Ninth Circuit correctly found in both *Gulliford I* and *Gulliford II* that the Respondent's only "act" was his speech. His speech was protected by the First Amendment.

Thrash accuses the Ninth Circuit of an "outcome oriented abuse of appellate authority." (Pet. 22.) He claims that this is so because the appellate panel rejected his blanket assertion that applying the law of the case doctrine would create a manifest injustice. As the first lawful order to disperse was issued *after* Gulliford was already under arrest, ("Disperse, disperse, that's *once*, you've been warned." (Ex. 10)), the only "manifest injustice" which occurred was when the second trial judge ignored the rulings of the original trial judge.

The Petitioner appears to find significance in the fact that Gulliford did not object to the inclusion of a jury instruction in *Gulliford II* pertaining to Failure To Disperse. (Pet. 22, n. 3.) Prior to the second trial of this matter, Gulliford brought motions in limine and provided the district court with extensive briefing in an attempt to prevent discussion of "other crimes" which had previously been excluded from the case. The district court refused to follow the law of the case doctrine, and allowed testimony and discussion of these other alleged "crimes". At that point, and having fully preserved his objections to the district court's decision, Gulliford's only remedy was to try to present the jury with a correct and detailed instruction regarding Failure To Disperse. This request was also denied by the second trial judge.

At Pet. 23, Deputy Thrash actually claims, "[P]laintiff *meant* to obstruct officers in their lawful efforts[.]" (Emphasis added.) He then cites a plethora of transcript pages which are devoid of any evidence that Mr. Gulliford "meant to obstruct" the officers.[11]

In alleging that Gulliford's words were a "true threat", Petitioner cites *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990), and *United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989).

In *Orozco-Santillan*, the defendant told the officer "take these handcuffs off and I'll kick your fucking ass",

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[11] Deputy Thrash includes in his Appendix 74 pages of snippets of testimony, a few questions and answers at a time, implying that these accurately represent the body of the testimony taken during three weeks of trial in *Gulliford I* and another week of trial in *Gulliford II*. Pursuant to *S.Ct. Rule 15.2*, Respondent Gulliford specifically states that these wisps of transcripts are misleading and obviously incomplete. The only remedy which Gulliford could use to respond to this unfair and misleading ploy would be to include the full transcripts of both trials, yet this would be in violation of *S.Ct. Rule 14.1(i)*. Suffice it to say that the Ninth Circuit was in possession of the complete record in formulating its decisions in both *Gulliford I* and *Gulliford II*.

The Petitioner also includes sixteen selected pages from his Ninth Circuit "Brief of Appellees" in *Gulliford II*. Many additional arguments and averments are contained in these pages which cannot be argued against within the page limits provided by this Court for briefs in opposition. (*See S.Ct. Rule 33.1(g)(ii)*.) In fact, adding the sixteen pages of additional briefing to the 27 pages contained in his petition for writ of certiorari, the Petitioner has managed to submit 43 pages of argument. Respondent Gulliford will merely issue a blanket statement that the extraneous briefing contains numerous misstatements of fact, law and the proceedings below.

and "you motherfucker, you will pay for this." *United States v. Orozco-Santillan*, 903 F.2d 1262, 1264 (9th Cir. 1990).

In *Gilbert*, the defendant drove an automobile at a black child, verbally threatened a white male who has a black step-brother, ordered his dog to attack a black child, and spat in the face of a mentally retarded black child. *United States v. Gilbert*, 813 F.2d 1523, 1525 (9th Cir. 1987).

Compare the facts of these cases with Mr. Gulliford's words in response to Deputy Thrash's statement, "I'm tired of this. This is a waste of government. . . . ". Gulliford stated, "Then why don't you hop on the ferry, hop on the ferry and go back." Petitioner's citations only serve to highlight the innocuous content and context of Gulliford's speech.

To fall outside of First Amendment protection, a statement must be a "true threat", meaning that "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates as a serious expression of intent to harm or assault." *See Lovell v. Poway Unified School Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990)). A threat has been defined as "an expression of an intention to inflict evil, injury, or damage on another." *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989).

Gulliford's words were not a threat as a matter of law, and the Ninth Circuit decision in *Gulliford II* correctly dispensed with Petitioner's grasping assertions that they were.

The Petitioner has attempted to change Gulliford's speech into physical acts, and his simple words into a threat. He then uses the resulting misstatements of fact and law to try to impugn the decisions of the Ninth Circuit. As the full panel of judges of that court have resoundingly stated – *twice* – by their refusal to even ask for a vote as to whether to rehear this matter en banc, Petitioner's attempts to change the unfortunate facts of this case have been unsuccessful.

CONCLUSION

Two of the Petitioner's questions regard qualified immunity, a subject which was not even mentioned in the decision in *Gulliford II*. The remaining question reargues facts which have been thoroughly reviewed by two Ninth Circuit panels and this Court.

These manufactured questions are not worthy of this Court's attention, and the Petitioner's bravado in attempting to trick this Court into rehearing a petition for writ of certiorari which it denied three years ago should be strongly repudiated by this Court.

Anyone old enough to have had the misfortune to break an old-fashioned glass thermometer will remember the frustration and futility of attempting to pick up the spilled mercury. It presented a moving and malleable target which defied all efforts to gain control over it.

So this case, with its ever-changing and reappearing defenses and allegations, has frustrated the efforts of the plaintiff, the district and circuit courts, and even this

Court which is now being asked to reexamine questions it has previously ruled upon. The decision of the Court of Appeals in *Gulliford II* should finally bring resolution to this matter by laying out firm guidelines for the district court to follow in reaching a just conclusion after almost seven years of federal litigation.

Respondent Gulliford respectfully requests that the petition for writ of certiorari be denied.

Dated: October 12, 2001

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 5, 1998

Ms. Diana Lynn Kiesel
14706 Union Avenue, S.W.
Lakewood, WA 98498

RE: Paul Thrash
v. Herbert Gulliford
No. 97-2082

Dear Ms. Kiesel:

The court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk